9 FAM 40.36
NOTES

(CT:VISA-849; 11-07-2006)
(Office of Origin: CA/VO/L/R)

9 FAM 40.36 N1 BACKGROUND AND SUMMARY

(CT:VISA-849; 11-07-2006)

a. Subsection (F) of section 212(a)(3) of the Immigration and Nationality Act (INA) was added by section 411(a)(2) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of October 26, 2001 (Public Law 107-56) (USA PATRIOT ACT). It was proposed by the Executive Branch and modeled in part on former INA 212(a)(27) and (28).

b. Subsection (F) was added to provide a flexible legal basis for denying entry to aliens who have been associated with terrorist organizations and whose travel to the United States would be inconsistent with the welfare, safety, or security of the United States. To ensure its use only in appropriate circumstances, it applies only if the Secretary of State or the Secretary of Homeland Security, each after consultation with the other, determines that the alien is associated with a terrorist organization and that the alien intends to engage in activities, while in the United States, that could endanger the welfare, safety, or security of the United States. The Secretary of State's authority to make such a determination has not been delegated to consular officers. Thus this provision can be used to deny visas only when such use is approved by the Department after a determination is made by the Secretary or an official to whom the Secretary's authority has been delegated.

9 FAM 40.36 N2 RECOMMENDING A FINDING OF INELIGIBILITY UNDER INA 212(a)(3)(F)

(CT:VISA-849; 11-07-2006)

a. The authority to determine whether an alien is inadmissible under INA 212(a)(3)(F) rests with the Secretary of State or the Secretary of Homeland Security, each in consultation with the other. Accordingly, if you believe that an individual may be inadmissible under this provision

you must refer the matter back to the Department for decision.

b. You should address the following in any request for a Department determination of ineligibility under this provision:

(1) Terrorist organization(s) involved. If the organization involved has been designated as a foreign terrorist organization under INA 219, as a Terrorist Exclusion List (TEL) organization under INA 212(a)(3)(B)(vi)(II), or under Executive Order 13224, provide the name of the organization and note the relevant designation(s). If an organization has not been designated under any of these authorities, explain why the organization is considered to be a terrorist organization and provide as much information as possible regarding the nature and structure of the organization and its activities. Include information on the nature, timing and relevant circumstances surrounding the organization's terrorist activities.

NOTE: "Terrorist Organization" is defined in INA 212(a)(3)(B)(vi) and references the definition of "engaged in terrorist activity" under INA §212(a)(3)(B)(iv) and "terrorist activity" as defined in INA 212(a)(3)(B)(iii).

(2) Nature of the alien's association. The Department believes that for an alien to be ineligible under INA 212(a)(3)(F), the association must be meaningful. Therefore, provide information concerning:

(a) The frequency, duration, and level of the alien's contacts with the organization;

(b) The nature and purpose of the alien's contacts with the organization; and

(c) The alien's awareness of association. Because terrorist organizations often operate in secret, provide your assessment of:

(1) Whether the alien knew or should have known that the organization was a terrorist organization. (See 9 FAM 40.32 N2.3 for relevant factors to consider.)

(2) Whether the alien knew or should have known that the person(s) with whom the alien had contact was a member, representative, or affiliate of the terrorist organization.

(3) Whether the alien knew or should have known that the person(s) with whom the alien had contact was engaged in terrorist activity.

(3) Alien's activities in the United States. Provide as much information as possible regarding the alien's proposed activities in the United

States and explain why these activities are cause for concern – i.e., why the determination required under subsection F should be made.

(4) Sources of evidence indicating that an applicant may be ineligible under INA 212(a)(3)(F) include the completed visa application, the applicant's statements, the results of name checks and advisory opinion (AO) requests (when required), checks of consular lookout and support system (CLASS) and post files, and any available outside information.

NOTE: Subsection (F) applies to an alien who "has been" associated with a terrorist organization, regardless of when that association occurred. Therefore, an alien whose association with a terrorist group took place prior to enactment of subsection (F) could be found inadmissible. On the other hand, the ineligibility can be triggered only if the alien intends while in the United States to engage . . . in activities that could endanger the welfare, safety, or security of the United States."

9 FAM 40.36 N3 FINDINGS OF INELIGIBILITY UNDER INA 212(a)(3)(F)

(CT:VISA-849; 11-07-2006)

a. In order to find an alien inadmissible under subsection (F), the Secretary of State or Homeland Security, each in consultation with the other (or their delegees), must find:

(1) That the alien has been associated with a terrorist organization; and

(2) That the alien intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.

b. Within the Department, Consular Affairs (CA) will normally take the lead in coordinating the necessary interagency consultations and ensuring that a determination, if made, is made by an appropriate Department official with delegated authority. Generally, a determination will be made only if INA 212(a)(3)(B) is not applicable.

c. As noted above, the Department believes that "associated with" requires a meaningful association. Generally, to be found inadmissible, an alien must have had contact over a period of time with individuals who the alien knew or should have known were members or representatives of a terrorist organization. A single meeting with a terrorist operative could be sufficient for finding that an alien has been "associated with" a

terrorist organization, however. For example, the Department would likely find an alien was associated with a terrorist organization if the alien had made a commitment at a single meeting with a known recruiter for a terrorist organization to act on the organization's behalf.

d. A finding that an alien "intends while in the United States to engage... in activities that could endanger the welfare, safety, or security of the United States" can be made in appropriate cases by inferring the necessary intent from the relevant facts and circumstances. For example, an alien who has extensive knowledge of explosives who has been meeting regularly with well-known members of a terrorist organization, and seeks to travel to the United States could be found inadmissible under subsection (F). Similarly, an alien who has received flight training, or has received counter-surveillance training from a terrorist organization (as defined in INA 212(a)(3)(B)(vi)) could be found to have such an intent based on these and other relevant facts, and therefore be found inadmissible under subsection (F).

e. It is not necessary that the alien intend to engage in activities that would be illegal or otherwise prohibited under the laws and regulations in the United States for the Department to find the alien inadmissible under INA 212(a)(3)(F). For example, an alien who intends to attend flight school in the United States – a lawful activity -- could be found inadmissible under subsection (F) if the facts are sufficient to permit the Secretary or her delegee to determine that the alien has been associated with a terrorist organization and that the alien's attendance at the flight school could endanger the security of the United States.

9 FAM 40.36 N4 SECURITY ADVISORY OPINION (SAO) MANDATORY

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The Department's security advisory opinion (SAO), by means of a "VISAS DONKEY" request is required for any visa application involving possible ineligibility under INA 212(a)(3)(F), both because subsection (F) can only be invoked by a Department official after consultation with Department of Homeland Security (DHS), and to ensure consistency and uniformity of interpretation. For procedural guidance, (see 9 FAM Appendix G 506). You must submit a SAO request if you believe the applicant is inadmissible under INA 212(a)(3)(F), even if you believe the applicant also may be refused under INA 214(b).

9 FAM 40.36 N5 FINDING OF INELIGIBILITY UNDER INA 212(a)(3)(F) NOT A PERMANENT BAR

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Because an INA 212(a)(3)(F) denial turns on whether the alien, intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States, an alien who has been denied a visa under INA 212(a)(3)(F) in the past will not necessarily be inadmissible the next time the alien applies for a visa. For cases involving an applicant whose previous visa application was denied under INA 212(a)(3)(F),you must submit a VISAS DONKEY SAO request either recommending denial on INA 212(a)(3)(F) grounds or explaining why you believe that the facts and circumstances have changed to such a degree that there is no longer any basis for finding the alien inadmissible under INA 212(a)(3)(F).